



On July 26, 2005, after finishing her job at the 25th Street and Wanamaker Road facility, claimant left that facility to return to respondent's facility. Rather than follow her original route along Wanamaker Road to 21st Street to Gage Boulevard, claimant decided to follow Wanamaker Road south to 29th Street and then west to Urish Road. Claimant testified her intent was to avoid the heavy traffic on Wanamaker Road. However, after driving to 29th Street and Urish Road, she remembered a house at 27th Street and Indian Hills Road that she was interested in buying. She proceeded to 27th Street and Indian Hills Road, and looked at the house. She didn't stop, but just drove by. She then proceeded north on Indian Hills, intending to return to respondent's facility at 10th Street and Gage Boulevard. However, at 21st Street and Indian Hills Road, claimant was injured in an automobile accident.

Respondent contends claimant's deviation was so major as to relieve respondent of any responsibility to pay for claimant's medical expenses or other benefits under the Kansas Workers Compensation Act. Claimant contends her deviation was minor and insignificant, and she would be entitled to workers compensation benefits, having been injured in an accident arising out of and in the course of her employment with respondent.

In workers compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.<sup>1</sup>

An employee shall be entitled to workers compensation benefits if he or she suffers personal injury by accident arising out of and in the course of employment.

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."<sup>2</sup>

It is the intent of the legislature that the workers compensation act shall be liberally construed for the purpose of bringing employers and employees within the

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<sup>1</sup> K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

<sup>2</sup> *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

provisions of the act to provide the protections of the workers compensation act to both. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.<sup>3</sup>

The words “arising out of and in the course of employment” as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer.<sup>4</sup>

The rationale for the “going and coming” rule is that while on the way to or from work, the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.<sup>5</sup>

However, there is an exception to the “going and coming” rule when travel upon the public roadways is an integral or necessary part of the employment.<sup>6</sup> Claimant argues this exception should apply as travel was an integral part of her employment. Respondent argues claimant's deviation should result in a denial of benefits.

Two Kansas cases which deal with substantial deviations are *Kindel* and *Foos*.<sup>7</sup> In both *Kindel* and *Foos*, the claimants had deviated substantially from their employment, only to have later returned to their employment once they were “on the direct route back to” their original destination.<sup>8</sup>

In *Kindel*, the court was asked whether an employee's personal or non-business-related activity would be a deviation from the employer's work. The court in *Kindel* determined the longer the deviation exists in time or the greater it varies from the normal

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<sup>3</sup> K.S.A. 2005 Supp. 44-501(g).

<sup>4</sup> K.S.A. 2005 Supp. 44-508(f).

<sup>5</sup> *Thompson v. Law Offices of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

<sup>6</sup> *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

<sup>7</sup> *Foos v. Terminix*, 277 Kan. 687, 89 P.3d 546 (2004).

<sup>8</sup> *Id.* at 692.

business route or in purpose from the normal business objectives, the more likely that the deviation will be characterized as major.

In the case of a major deviation from the business purpose, most courts will bar compensation recovery on the theory that the deviation is so substantial that the employee must be deemed to have abandoned any business purpose and consequently cannot recover for injuries received, even though he or she has ceased the deviation and is returning to the business route or purpose.<sup>9</sup>

A more problematic situation exists when the deviation is, in the geometry of deviations, described as a triangular deviation.<sup>10</sup> In a triangular deviation, an employee goes somewhat out of his or her way for personal reasons, and is angling back in the direction of his or her employment destination. In Larson's, the majority rules in favor of compensability.<sup>11</sup>

Here, claimant's deviation is more in line with a triangular deviation. Her personal business concluded, she had returned to her employment duties and she was once again returning to respondent's facility.

In these triangular cases, no fixed formula seems possible.

Perhaps the most that can be said is that the court must form a judgment on whether the real function of the journey back toward the main route is essentially to undo the effects of the private detour or to carry the employee toward his employment destination.<sup>12</sup>

Here, the Board finds claimant's deviation to be an insignificant triangular deviation, with claimant having returned to her business purpose at the time of the accident. Therefore, the Order of the ALJ granting benefits is affirmed.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Bryce D. Benedict dated February 10, 2006, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

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<sup>9</sup> *Kindel, supra.*, at 284.

<sup>10</sup> 1 *Larson's Workers' Compensation Law* § 17.04[1] (2005).

<sup>11</sup> *Id.* at § 17.04[1] (2005).

<sup>12</sup> *Id.* at § 17.04[3] (2005).

Dated this \_\_\_\_ day of April, 2006.

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BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant  
M. Joan Klosterman/Matthew J. Hempy, Attorney for Respondent and its Insurance  
Carrier  
Bryce D. Benedict, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director